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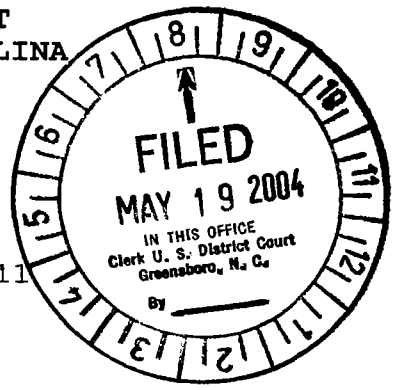
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



SETRA OF NORTH AMERICA, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:03CV00711
	)	
ERNST and SUSANNA SCHAR,	)	
	)	
Defendants.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

I. Facts

This case comes before the Court on defendants' motion to dismiss for lack of personal jurisdiction and venue or, in the alternative, to transfer the case to the United States District Court for the Western District of Texas. The evidence submitted by the parties does not disclose any serious disputes concerning the facts of the case, which are as follows.

Defendants Ernst and Susanna Schar are a husband and wife who operate a tour bus company in Axtell, Texas. Plaintiff, Setra of North America, Incorporated, is a corporation in the business of selling and leasing tour buses. It is a Maine corporation that was originally headquartered in that state, but which moved its principal place of business to Greensboro, North Carolina, in September of 2000. Between the early months of 2000 and the fall of 2001, the Schars leased or purchased five tour buses which were provided by or through Setra.[1] It is these transactions which,

[1]It actually appears that at the beginning of the negotiations for purchases of the tour buses, plaintiff was known as Kassbohrer of North America (continued...)

through a somewhat circuitous route, eventually led to this case being brought in this Court.

In April of 2000, the Schars negotiated and signed an agreement to purchase a used 1999 model bus from Setra. They negotiated this agreement with Wayne Lester, Setra's Southwest Representative, whose office was in Los Angeles, California. The agreement to purchase is signed by both the Schars and Lester. This agreement called for a purchase price of $350,000, with a down payment of $10,000 and a balance of $340,000. Ernest Schar states that the down payment was delivered to Lester in California. As a result of this agreement, the bus was shipped from Maine and delivered to Ernst Schar in California.

The Schars were unable to pay the full purchase price of the bus in cash. Therefore, the $340,000 balance owed to Setra was financed through Mercedes-Benz Credit Corporation (MBCC), now DaimlerChrysler Financial Services North America LLC (DCFS). These entities were and are located in Illinois. All payments made by the Schars on the resulting note were then made to MBCC or DCFS from Texas. Finally, the note states that it is controlled by Texas law.

Around the same time, the Schars negotiated the purchase of a another bus under terms similar to those of the first bus. The sale of the second bus, a 1998 model, was actually completed

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[1](...continued)
and only became Setra of North America around the time of the company's move to Greensboro in September of 2000. For the sake of simplicity, plaintiff will simply be referred to as "Setra" throughout the opinion.

February 12, 2000, when an agreement to purchase was signed. It is not clear who signed the agreement on behalf of Setra, but Ernst Schar states in his affidavit that he negotiated the purchase with Wayne Lester in California. Until financing was obtained, the Schars made payments to Setra in Maine. However, the bus was apparently not shipped until October of 2000, when it was shipped FOB Gray, Maine, to Nevada, where Ernst Schar picked it up.[2] Financing for the deal was provided by MBCC under the same terms as the first bus.

The Schars' next purchase was made in April of 2001, or after Setra moved to North Carolina. Still, the Schars dealt with Setra's representative in California in negotiating the purchase. The Schars sent a down payment check to North Carolina and the bus was then shipped from North Carolina to Texas. Like the first two buses, financing was provided by MBCC and all further payments were then controlled by the terms of the Schars' note with MBCC.

Although MBCC provided the financing necessary to facilitate the sales between the parties, this did not occur without further inducement by Setra. Apparently, the Schars' credit rating was not what MBCC wanted it to be and MBCC required that Setra give its own guarantee of the notes. Setra did give these guarantees. However, as far as the record indicates, the Schars did not know of Setra's guarantees at the times that they were made. In fact, the earliest

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[2]Although Setra had moved its headquarters to North Carolina by the time the second bus shipped, Setra's own documents show the bus as being shipped from Maine.

time that the evidence shows they knew of Setra's guarantees is near the beginning of March of 2003.

In addition to the three outright bus purchases, the Schars later obtained two buses through "leases." Under these leases, an entity known as Motorcoach Financial, Incorporated (MFI), a Pennsylvania corporation doing business in Connecticut, was the nominal owner of the buses. The Schars agreed to lease the buses from MFI for six years. At the end of that time, the Schars had the option to buy the buses for $1. Even though MFI was listed as the owner of the buses, the Schars negotiated the terms of the bus purchases with Wayne Lester, just as they had in the past. One of the Purchase Orders was signed in Texas, the other in Nevada. The leases were then executed with MFI, and the buses were shipped from North Carolina; one to Texas and one to Nevada. The invoices for the buses listed MFI as the owner.

So far as the record indicates, no payments on the leased buses were ever sent to North Carolina and MFI did not request that Setra give guarantees similar to the guarantees it supplied to MBCC for the purchased buses. Furthermore, the leases purport to be governed by Connecticut law and even have a forum selection clause requiring that any litigation concerning the leases be brought in Connecticut. Finally, Setra is listed as a secondary secured party on a UCC Financing Statement which was filed in Texas as to one of the two leased buses.

For some time, the Schars were able to make their payments on the notes and leases. During this time, Ernst Schar had periodic

telephone contact with Setra's personnel in North Carolina concerning warranty and payment issues. He also sent certain faxes and warranty claim forms to Setra in North Carolina, and ordered parts from Setra in North Carolina and Florida. Once, he brought one of the buses to North Carolina to allow Setra to perform certain maintenance work.

Unfortunately, in 2002, the Schars began to fall behind on their payments. By early December of 2002, MFI declared the Schars to be in default under the terms of the leases and DCFS followed by declaring the notes to be in default in January of 2003. At that point, the Schars, their legal counsel, DCFS, MFI, and Setra all tried to negotiate together to work out payment plans. During these negotiations, the Schars were informed of Setra's guarantees of the notes. They were also told that both the notes and leases would be assigned to Setra by DCFS and MFI and that Setra would then be the entity seeking payments on the obligations.

Eventually, the attempts to salvage the situation failed. As a result, the Schars either returned or had the buses taken from them in Texas, the notes and leases were assigned from DCFS and MFI to Setra, and this litigation began. However, shortly before Setra filed suit, it received a letter from the Schars' attorney. That letter accused Setra of certain misrepresentations and breaches of warranty in connection with three of the buses. It stated that these acts violated the Texas Deceptive Trade Practices Act and demanded that Setra pay the Schars over $95,000 in damages and

rescind and terminate any agreements pertaining to those three buses.

II. Plaintiff's Claims

Setra has styled its complaint as having three claims for relief: (1) a breach of contract claim based on the notes, (2) a breach of contract claim based on the leases, and (3) a declaratory judgment claim seeking a declaration that Setra did not violate the Texas Deceptive Trade Practices Act as alleged in the Schars' demand letter. However, the structuring of Setra's complaint ignores the fact that each note or lease was an entirely separate transaction. The notes and leases were negotiated at different times and/or places and all involved different buses. Therefore, the Court will treat each note or lease as being the basis for a separate breach of contract claim.

III. Discussion

Defendants seek to dismiss the breach of contract and lease claims based on lack of personal jurisdiction and improper venue or, in the alternative, seek to transfer the case to the Western District of Texas pursuant to 28 U.S.C. § 1406, which allows transfer to any district where the case could have been brought. As will be seen, neither jurisdiction nor venue lie in this District for the breach of contract or lease claims. The same may not be true for the declaratory judgment claim, but this Court should dismiss it for other reasons.

A. Personal Jurisdiction as to the Breach of Contract and Lease Claims

The Schars seek to have this case either dismissed or transferred to the Western District of Texas. To support dismissal, they argue that this Court lacks personal jurisdiction over them. When defendants in a diversity action make such a motion, the plaintiff has the burden of establishing personal jurisdiction as to each defendant. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533, 536 (M.D.N.C. 1989). Moreover, because Setra uses North Carolina's long-arm statute to establish jurisdiction over the Schars, the Court must first look to see whether that statute authorizes jurisdiction and then determine whether the exercise of that jurisdiction satisfies the due process standards found in the Fourteenth Amendment of the United States Constitution. Ellicott Machine Corporation, Inc. v. John Holland Party Ltd., 995 F.2d 474 (4th Cir. 1993).

Setra fails to specifically point to any provision of North Carolina's long-arm statute authorizing jurisdiction over its claims. However, among others, the provisions directly relating to Setra's arguments in favor of jurisdiction state that the Court has jurisdiction over actions against a person "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise" and over an action that "[r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." N.C. Gen. Stat. § 1-75.4(1)(d) & (5)(d). In

any event, the North Carolina long-arm statute has been construed to reach to the limits of constitutional due process. For this reason, the two-step analysis really collapses into a single due process inquiry. The Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan, 259 F.3d 209 (4th Cir. 2001).

Due process concerns are met when a defendant has "'certain minimum contacts'" with the forum state "'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984), quoting, International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The minimum contacts test requires there to be sufficient connection between a defendant and a forum so that it is "fair to require defense of the action in the forum." Kulko v. California Superior Court, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978).[3] In applying

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[3]As stated by the court in First American First, Inc. v. National Ass'n of Bank Women, 802 F.2d 1511, 1515 (4th Cir. 1986):

> The basic principle is of course that the defendant must have "certain minimum contacts" with the forum state and that the exercise of jurisdiction over him "does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The constitutional interest protected is the individual's liberty interest in not being bound in personam by judgments of a forum with which he lacks meaningful contacts, ties or relations. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 468, 105 S.Ct. 2174, 2180, 85 L.Ed.2d 528 (1985). These minimum contacts cannot have had their source in the "unilateral activity of those who claim some relationship with a nonresident defendant," Hanson v. Denckla, 357

(continued...)

a concept as abstract and subjective as fairness, courts have used a great many terms and tests to decide the particular cases before them. However, and as is particularly important to the instant case, fairness remains the underlying touchstone of any personal jurisdiction/due process analysis.

Because of the ultimate focus on fairness, the combination of the amount and type of "minimum contacts" necessary to establish jurisdiction varies considerably depending on whether or not the plaintiff's cause of action is "related to" or "arises out of" the contacts with a forum state. Where it does, the Court is said to be exercising "specific jurisdiction" and a defendant may be subject to the Court's jurisdiction based on fewer general contacts with the forum. First American First, Inc. v. National Ass'n of Bank Women, 802 F.2d 1511, 1515 (4th Cir. 1986).

On the other hand, if the cause of action does not relate to or arise from a defendant's contacts with the forum state, personal jurisdiction can exist only as "general jurisdiction" and much more

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[3](...continued)
U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958), but must be found in conduct of the defendant by which he "purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," id.; see also Burger King, 471 U.S. at 475, 105 S.Ct. at 2183. The "purposeful availment" requirement guards against the possibility that a defendant will be haled into a forum solely as a result of "random, isolated, or fortuitous" contacts. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984). What is sought is conduct by the defendant in relation to the forum state "such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

substantial general contacts are needed. Id. This situation requires continuous and systematic contacts. Helicopteros, 466 U.S. at 415.

> This important distinction between specific and general jurisdiction rests upon two simple and obvious points. First, that all other factors aside, a state obviously has a greater and more legitimate interest in providing a forum for claims based upon conduct causing harm within its borders than for those based on conduct unconnected throughout its course with the forum's territory. Second, that, in corollary, an out-of-state defendant should more reasonably expect to be haled into a foreign state's courts when his purposefully targeted conduct has caused harm within that state's borders than when the specific conduct upon which a claim against him is based is unrelated territorially to a state with which he is not in continuous and systematic general contact. As a general proposition, that is, it is more "fair" to exercise jurisdiction when there is a close "relationship among the defendant, the forum, and the litigation" than when there is no relation between forum and litigation. See Helicopteros Nacionales, 466 U.S. at 414, 104 S.Ct. at 1872 (citing Shaffer v. Heitner, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977)).

First American, 802 F.2d at 1516. In the present case, Setra asserts that both general and specific jurisdiction exist for its claims. Therefore, the Court will deal with each of these questions in turn.

i. General Jurisdiction

In order for general jurisdiction to exist, the Schars must have had "continuous and systematic" contacts with North Carolina. Id. at 416, 104 S.Ct. at 1873. These contacts must be so extensive that it would be fair to have the Schars answer in the courts of North Carolina for any claim brought by any party no matter where the events creating the claim took place. Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 787 (7th Cir.

2003). Put another way, the contacts must be so extensive that they are the equivalent of physical presence in the forum state. Id. at 787, n.16, citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000).

The Schars' contacts with North Carolina fall far short of those necessary to establish general jurisdiction. In making its argument to the contrary, Setra relies on the fact that the Schars made over sixty warranty claims regarding the buses they bought or leased, made various telephone calls and facsimile transmissions into North Carolina to discuss warranty and payment issues, and ordered parts from North Carolina. However, as this and other courts have pointed out, simply entering into a contract in a state is not enough, by itself, to establish personal jurisdiction. CPB Resources, Inc. v. Ingredient Resource Corporation, 954 F. Supp. 1106, 1109 (M.D.N.C. 1996); Bell Paper Box, Inc. v. Trans Western Polymers, Inc., 53 F.3d 920, 922 (8th Cir. 1995); Pacific Coral Shrimp v. Bryant Fisheries, 844 F. Supp. 1546, 1550 (S.D. Fla. 1994). This is particularly true for buyers of goods, as opposed to sellers. Bell Paper Box, 53 F.3d at 922.

Here, the Schars' contacts with North Carolina consisted mainly of buying or leasing three buses, some of which were shipped from this State, making necessary parts purchases, and making warranty claims (perhaps as to all five buses) which would have been similar in nature to parts purchases. Most of the Schars' telephone and fax contact with the State also seems to be related to these purchases and warranty claims. Significantly absent is

any sign that the Schars ever engaged in their tour business in North Carolina. They never solicited customers here or picked up or dropped off passengers in the State. In fact, other than Ernst Schar passing through on a handful of occasions and making one stop to bring a bus in for maintenance, it does not appear that either of the Schars have ever been physically present in the State. These are hardly the sort of systematic and continuous contacts necessary for general jurisdiction.[4]

Setra relies on the case of Dove Air v. Bennett, 226 F. Supp. 2d 771 (W.D.N.C. 2002), to bolster its argument for general jurisdiction. Unfortunately for Setra, that case is largely inapposite. Dove Air involved a defendant that had solicited a North Carolina resident to become his agent for the purposes of buying, refurbishing, and reselling aircraft in North Carolina. In other words, the defendant contracted to have his agent fully perform his business in North Carolina. Id. at 778. This stands in stark contrast to the Schars business which does not operate in North Carolina and only has slight and scattered contact with the State. The Court finds that the Schars' ties to the State are actually more akin to the facts present in Helicopteros, supra.

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[4]The unfairness of finding the Schars subject to suit in North Carolina based on general jurisdiction is highlighted by the following example. If Setra's general jurisdiction argument were found to be correct, a resident of any state, injured in that state in an automobile accident with one of the Schars' buses, could then, at least for due process purposes, sue the Schars in the courts of North Carolina. It is difficult to believe that the notion of fundamental fairness inherent in the principle of due process would allow for such a result which arises mostly from fortuity and smacks of being arbitrary and/or capricious.

There, a foreign corporation was sued in a state court in Texas. The corporation had purchased helicopters, equipment, and training services from a corporation in Texas, had sent its chief executive officer to Texas for a contract negotiation, had sent personnel to Texas for training, and had accepted checks drawn on a Texas bank. Id. at 416, 104 S.Ct. at 1873. Still, the United States Supreme Court found that contacts at this level, which were far greater than the Schars' contacts with North Carolina, were insufficient to support a finding of general jurisdiction. Id. at 418, 104 S.Ct. at 1874. For this same reason, general personal jurisdiction does not exist over the Schars in North Carolina.[5]

ii. Specific Jurisdiction

Having failed to present facts establishing general personal jurisdiction over the Schars, Setra must now demonstrate the existence of specific jurisdiction. Specific jurisdiction, as previously noted, is present when a plaintiff's claims arise out of or relate to a defendant's contacts with the forum state. Helicopteros, 466 U.S. at 414, 104 S.Ct. at 1872. Because of their nature, the amount of these contracts may be less than those

[5]Although the items bought by the Schars were large and expensive, the Schars are not very different from many other consumers who, in these times of increasing internet and catalog sales, buy products from other states. Such purchases often involve telephone, fax, or internet communication, and may later lead to repeated purchases, parts purchases, or the shipping back and forth of products for warranty repairs. Certainly, such purchasers would be quite shocked to discover that they were subject to suit in a state simply because they purchased goods or services there. This would be a significant and unwarranted broadening of the concept of general jurisdiction. Stover v. O'Connell Associates, Inc., 84 F.3d 132, 137 (4th Cir.), cert. denied, 519 U.S. 983, 117 S.Ct. 437, 136 L.Ed.2d 334 (1996).

required to establish general jurisdiction, although the ultimate test for jurisdiction, "fairness to the defendant," remains the same.

To decide a question of specific jurisdiction, a court must examine the "'relationship among the defendant, the forum, and the litigation'" in order to determine whether minimum contacts sufficient to allow for specific jurisdiction exist. Burlington Industries, Inc. v. Yanoor Corp., 178 F. Supp. 2d 562, 567 (M.D.N.C. 2001), quoting Helicopteros, 466 U.S. at 414, 104 S.Ct. at 1872. Where contract claims are made, the "contract must have a substantial connection with the state so that the nature and quality of a defendant's relationship to the forum 'can in no sense be viewed as random, fortuitous, or attenuated.'" Id., quoting, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

In the present case, Setra is suing based on the Schars' alleged breaches of the notes and leases which were used to finance the purchase of buses from Setra. These notes and leases were all negotiated and executed outside the State of North Carolina by parties not present in this State. They are not governed by North Carolina law and no performance by the Schars in North Carolina appears to have been contemplated by the notes and leases at the time that they were formed. Instead, the Schars were obligated to make payments from Texas to Illinois under the notes, or from Texas to Connecticut under the leases. To the extent that payments were

due from MBCC and MFI to Setra in North Carolina, this was not a direct contact by the Schars with this State.

Setra attempts to avoid the problem of the notes and leases having no direct connection to North Carolina by pointing to other activities of the Schars. However, these activities are not relevant because they are not directly connected to the notes and leases. First, it attempts to frame its claims as if it were seeking relief based on the Schars' default on their obligation to pay for the tour buses they purchased from Setra. However, between payments by the Schars, DCFS, and MFI, Setra was apparently paid in full. In any event, the Schars only defaulted on the notes and leases with DCFS and MFI and they are the bases for Setra's claims, not the purchase agreements.[6] Therefore, any contacts that the

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[6]Even if Setra were suing on the purchase contracts, it would, nevertheless, be very doubtful that the Schars could be said to have minimum contacts with North Carolina. It appears from the record that two of the buses, not one, were sold to the Schars while Setra was headquartered in Maine. It is true that the second bus sent to the Schars was not shipped until after Setra moved its headquarters, but the contract to purchase was negotiated months before the move. Further, the bus was shipped from Maine, not North Carolina. Therefore, there is no evidence of any North Carolina connection stemming from the negotiations, purchase contracts, down payments, shipments, etc., of the first two buses sold by Setra to the Schars.

As for the three later buses, some contacts between the Schars and North Carolina do exist. However, Setra's argument based on contacts at the time of purchase greatly overstates the extent of those contacts. For instance, while it is true that the Schars did negotiate the purchase agreements for these buses with Setra while Setra was headquartered here, the negotiations took place with Setra's representative in Los Angeles. There is no evidence that the Schars met with, communicated with, or negotiated directly with anyone in North Carolina concerning the purchase of any of the buses. The application for temporary North Carolina tags appears to have been an action by Setra, not the Schars. Although Setra is listed on a UCC filing as a secured party on one of the buses, this filing was made in Texas, not North Carolina. One down payment on one bus was sent by the Schars to this State. This is scant evidence of purposeful activity in North Carolina on the part of the Schars. Borg-Warner Acceptance Corp. v.

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Schars had in North Carolina at the time of the purchase agreements would be indirect or, in the parlance of personal jurisdiction, remote and attenuated in relation to the notes and leases upon which Setra now bases its claims.

Next, Setra attempts to use its status as an assignee of the notes and leases to establish jurisdiction. However, Setra's status as an assignee, rather than an original party to the notes and leases, does not create extra rights. It is a general rule of law that when a valid assignment is executed, the assignee then stands in the shoes of the assignor. duPont de-Bie v. Vrendenburgh, 490 F.2d 1057, 1061 (4th Cir. 1974). Setra has advanced no argument as to why that rule should not be used when applying the minimum contacts test for ascertaining jurisdiction and, indeed, the rule seems particularly applicable to such situations. Jurisdictional analyses focus on the actions of the defendants to determine whether it is fair to hale them into court in a given forum. First American, 802 F.2d at 1514, 1515. Defendants' reasonable expectations about where they might be expected to defend an action will normally be determined by their relationship with the assignor. The unilateral activity of others in setting up an assignment, even though related to the Schars' notes and leases, does not establish that the Schars were purposely availing themselves of the privilege of doing business in North

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[6](...continued)
Lovett & Tharpe, Inc., 786 F.2d 1055 (11th Cir. 1986)(collecting cases).

Carolina. See in general First American, 802 F.2d 1515, 1516.[7] Therefore, Setra stands in place of MBCC/DCFS and MFI and the notes and leases it is suing upon must be evaluated from the viewpoint of the Schars in making the agreements with those parties.

Setra's next argument seeks to rely on the events after the Schars' alleged breach of the notes and leases. Setra claims that jurisdiction exists because the Schars knew by at least March of 2003 that the notes and leases would be assigned to Setra and, yet, had purposeful contacts with Setra in North Carolina in order to negotiate a settlement concerning the Schars' debts. The flaw in this argument is that Setra fails to show that there was an agreement resulting from these negotiations. Negotiations not leading to a contract do not constitute meaningful contacts which may be used to establish in personam jurisdiction in a state. Integrated Consulting Services, Inc. v. LDDS Communications, Inc., 176 F.3d 475, 1999 WL 218740 (4th Cir. Apr. 15, 1999)(No. 98-1277)(Table p.8 & n.3); Coating Engineers (Private) Ltd. v. Electric Motor Repair Co., 826 F. Supp. 147, 149 (D. Md. 1993). And, unsuccessful settlement negotiations, in particular, are not

[7]One possible exception might arise should the contract itself contain a specific assignment clause wherein a party agrees that a contract may be assigned and that the party agrees to be subject to personal jurisdiction in whatever forum the assignee chooses. In some circumstances, waiver of personal jurisdiction is permissible. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The notes and leases at issue in the present case do not contain such provisions.

a suitable measure for determining jurisdiction.[8] Digi-Tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd., 89 F.3d 519, 524-525 (8th Cir. 1996).

Finally, Setra contends the Schars failed to pay on the notes and leases, thereby injuring Setra in this State. This theory seeks to find jurisdiction in the fact that Setra was eventually "injured" by the Schars' non-payment.

As an initial matter, the Court notes that there are conceptual difficulties with emphasizing the idea of "injury" in a breach of contract case. Normally, injury and the location of an injury are important considerations where tort claims are raised. This is because torts are usually based on an action, often intentional, directed into a particular forum which causes injury, whereas breach of contract claims can as easily involve a nonaction which may or may not be beyond the control of the defendant. When an action is directed into a forum and causes an injury, this goes a long way toward satisfying the element of fairness, which is necessary to subject a person to jurisdiction in the forum where the person caused the injury. However, with a nonaction, there is

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[8]At the time of the negotiations, DCFS and MFI still held the notes and leases and had declared them to be in default. Therefore, the breach of contract claims had already accrued. The fact that Setra was allowed to sit in on or participate in negotiations did not give rise to its claims. Allowing unsuccessful settlement negotiations to constitute significant contacts would be an invitation to manufacture jurisdiction by simply engaging debtors in negotiations. And, in the long run, this would discourage the compromise and settlement of claims. Digi-Tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd., 89 F.3d 519, 524-525 (8th Cir. 1996). Setra's position offers little to be desired. For this additional reason, the Schars' post-default negotiations with Setra do not subject them to personal jurisdiction in front of this Court.

nothing directed into any forum and it becomes less clear that it is fair to hold a party liable in a forum where he did not direct any action but injury resulted.

Even in a tort case, the mere fact that some economic effects will be felt by the plaintiff in the state of its residence is not sufficient, by itself, to satisfy the minimum contacts test. ESAB Group Inc. v. Centricut, Inc., 126 F.3d 617, 625-626 (4th Cir. 1997), cert. denied, 523 U.S. 1048, 118 S.Ct. 1364, 140 L.Ed.2d 513 (1998). In addition to suffering economic injury in its home state, the plaintiff must show that the injury was occasioned by the defendant's purposeful contacts. Id. Were it otherwise, the plaintiff's residence would always be sufficient, by itself, to establish jurisdiction. Id. Such a rule would radically alter jurisdictional due process analysis, which heretofore has relied on purposeful activity of a defendant, as opposed to fortuitous consequences.[9] For the above reasons, the Court rejects Setra's

[9]In addition, the attempt to rely on injury in this case is particularly inapposite because any injury would have occurred at the time of breach and default on the notes and leases. In December of 2002 and January of 2003, the Schars were declared to be in default under the notes and leases by DCFS and MFI, respectively. These declarations occurred well prior to Setra being assigned the notes and leases and even before there is evidence that the Schars knew that the assignments were a possibility. Therefore, any injuries which may have occurred were suffered in Illinois and Connecticut by DCFS and MFI, not in North Carolina by Setra. After the assignment, any injury to Setra in North Carolina was caused by its own actions in agreeing to the assignments and the actions of DCFS and MFI in making the assignments. Yet, it is the Schars' actions, not those of Setra or third parties, which are relevant to the existence of personal jurisdiction. Chung v. NANA Development Corp., 783 F.2d 1124, 1128 (4th Cir. 1986), citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984).

attempt to establish jurisdiction based on settlement negotiations or based on its alleged injury.

B. Personal Jurisdiction as to the Declaratory Judgment Claim

The Schars have not argued that personal jurisdiction does not exist as to Setra's declaratory judgment claim. That claim arises from warranty disputes between the parties. The Schars, nevertheless, seek dismissal or transfer of that claim based on other grounds. This will be discussed later.

C. Venue

In addition to raising personal jurisdiction as a basis for dismissing or transferring Setra's claims, the Schars also argue that venue is not proper for the claims based on the notes and leases.[10] The Court agrees.

Setra only asserts 28 U.S.C. § 1391(a)(2) as a basis for venue.[11] This subdivision provides for venue where "a substantial part of the events or omissions giving rise to the claim occurred." Setra contends that venue is proper under this subsection based on "[t]he same facts that make personal jurisdiction proper." (Pl.

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[10]As with personal jurisdiction, the Schars do not make an argument that venue is not proper in this District for the declaratory judgment claim. That claim will be dealt with on separate grounds later in this Recommendation.

[11]Section 1391(a) states that where, as here, jurisdiction in a case is founded on diversity of citizenship, venue is proper in (1) a district in which any defendant resides, if they all reside in the same state, (2) a district where "a substantial part of the events or omissions giving rise to the claim occurred," or (3) in a district where any defendant is subject to personal jurisdiction if no proper district exists under (1) and (2). Here, neither of the Schars reside in North Carolina, but rather in the Western District of Texas, which makes that district a place of proper venue under subsection (1).

Brf. at 15) It reiterates that the Schars initiated some contacts with it in this District, that they frequently communicated with it in this District, and that they could easily foresee causing injury in this District. These are the same activities Setra relied on in its attempt to establish jurisdiction in this District.

Setra's venue argument fails because, on its face, the language in the venue statute is no broader than the usual test for specific jurisdiction. Venue under Section 1391(a)(2) is claim specific and looks at the events surrounding each claim. Therefore, determining venue under subsection (2) is analogous to determining specific personal jurisdiction. However, specific jurisdiction looks at contacts which both relate to or give rise to a claim.[12] Under the plain language of the venue statute, only events and omissions giving rise to a claim are considered. For this reason, the test for determining venue arguably may be narrower than the test for determining specific in personam jurisdiction.[13] Consequently, because Setra cannot establish

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[12]The United States Supreme Court has not interpreted the language in 28 U.S.C. § 1391(a)(2) and given guidance as to whether courts should consider only events or omissions directly giving rise to a claim or also those related to it. In fact, even in addressing similar terms in the personal jurisdiction context, the Supreme Court has explicitly reserved the question of "whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum." Helicopteros Nacionales De Colombia v. Hall, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984).

[13]Some courts have explicitly stated that the language in the venue statute should be construed to allow venue in a district where acts closely related to or surrounding the case occurred. See Precept Medical Products, Inc. v. Klus, 282 F. Supp. 2d 381, 388-389 (W.D.N.C. 2003)(considering related events); Figgie International, Inc. v. Destileria Serralles, Inc., 925 F. Supp. 411, 413 (D.S.C. 1996)(considering events "surrounding" the case). Other courts have taken a much (continued...)

jurisdiction over the Schars in this District, it cannot establish venue under Section 1391(a)(2).

D. Dismissal or Transfer

In this part of the motion, the Schars primarily seek dismissal of Setra's claims, but do concede that they would accept transfer of the claims to the Western District of Texas where venue and personal jurisdiction would not be in question. Either disposition is permissible in this situation. Chung v. NANA Development Corp., 783 F.2d 1124, 1130 (4th Cir. 1986)(remanding for consideration of transfer after finding of no personal jurisdiction); MTGLQ Investors, L.P. v. Guire, 286 F. Supp. 2d 561, 566 (D. Md. 2003)(claims can be dismissed after a finding of lack of venue). For its part, Setra opposes the motion generally, but expresses no preference between dismissal or transfer should the Court find personal jurisdiction and/or venue are absent. Because it is apparent that jurisdiction and venue lie in the Western District of Texas and in order to save Setra any expenses associated with refiling the case, the Court finds that transfer is the more appropriate course of action for this case. Therefore, the Schars' motion to dismiss or transfer this case should be

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[13](...continued)
more restrictive approach to the events that will be considered. Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1372 (8th Cir. 2003)(venue considerations very narrow, not as broad as personal jurisdiction analysis); Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995)(only acts of a defendant should be considered); MTGLQ Investors, L.P. v. Guire, 286 F. Supp. 2d 561 (D. Md. 2003)(looking only at critical elements of a claim). Still others profess to take a "holistic" approach which appears to be something of a middle ground. Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 43 n.6 (1st Cir. 2001).

granted to the extent that it seeks transfer of Setra's breach of contract claims.

E. Dismissal of the Declaratory Judgment Claim

The Schars contend that Setra's declaratory judgment claim does not meet the requirements of the Declaratory Judgment Act and that, even if it does, the Court should decline to accept the case. The Declaratory Judgment Act allows courts to issue declaratory judgments where there is a "case or controversy" as defined by the United States Constitution and where subject matter jurisdiction exists over that case or controversy. Dunn Computer Corp. v. Loudcloud, Inc., 133 F. Supp. 2d 823, 826 (E.D. Va. 2001). Here, the Schars and Setra reside in different states and the amount in dispute in Setra's declaratory judgment claim far exceeds $75,000. Therefore, diversity jurisdiction exists and the requirement that the Court have subject matter jurisdiction is met. See 28 U.S.C. § 1332. The existence of an actual case or controversy is another matter.

It is Setra's burden to show that an actual case or controversy exists and it must do so by a preponderance of the evidence. Dunn, 133 F. Supp. 2d at 827. In order to meet its burden, Setra must demonstrate that it has an objectively real and reasonable fear of litigation and that there has been a course of conduct that creates an adversarial conflict between it and the Schars. Id. Moreover, the reasonable fear of litigation must be based on the Schars' actions and is to be determined from the totality of the circumstances. Id.

The only action of the Schars which Setra has advanced as giving a reasonable fear of litigation is the demand letter sent to it by an attorney representing the Schars. This letter accuses Setra of having breached express and implied warranties and having misrepresented a number of facts relating to warranty repairs performed on three of the buses that the Schars purchased from Setra. The letter further claims that these acts violate the Texas Unfair and Deceptive Trade Practices Act and demands that Setra pay over $95,000 in damages to the Schars and rescind all agreements between the Schars and Setra relating to those three buses.

The question before the Court is whether the demand letter was sufficient to create an objectively reasonable apprehension on Setra's part that litigation was imminent on the issues raised in the letter. It must first be noted that the letter itself never explicitly threatens litigation or, for that matter, even mentions litigation. It simply states that the Schars believe that Setra violated Texas law and demands certain relief. This certainly weakens Setra's argument in favor of a reasonable fear of imminent litigation. Id. Still, because the letter must be considered in light of surrounding circumstances, the mere fact that litigation is not explicitly mentioned does not necessarily doom Setra's claim. But, that is the result when the surrounding circumstances are considered.

At the time that the letter was sent, the Schars had been negotiating with Setra, DCFS, and MFI in order to try to prevent litigation on the notes and leases on which the Schars allegedly

owed millions of dollars. The Schars' family-owned business was in serious financial difficulty. It is somewhat unlikely then that they would initiate costly and provocative litigation against the corporate entity which was the assignee of the notes and leases. More likely, the letter should have been viewed by Setra as an attempt at posturing for further negotiations or an attempt to convince Setra that it should not litigate against the Schars because they might raise claims of their own.

Also to be considered is the fact that demand letters such as the one sent by the Schars are required under Texas law before any claims under the Texas Unfair and Deceptive Trade Practices Act can be brought. See Tex. Bus. & Com. Code Ann. § 17.505(a). While in one sense this fact might make the letter look more like a prelude to litigation by the Schars, the purpose of requiring such letters is to encourage parties to settle their differences short of litigation. Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983), citing, Barnado v. Mecom, 650 S.W.2d, 123, 127 (Tex. Ct. App. 1983) and Robert E. Goodfriend & Michael P. Lynn, Of White Knights and Black Knights: An Analysis of the 1979 Amendments to the Texas Deceptive Trade Practice Act, 33 Southwestern L.J. 941, 988-996 (1979). It would then be ironic, absent an explicit threat of litigation in the letter or other evidence of such a threat, to find that a letter which the Texas legislature requires in order to prevent litigation and encourage negotiation somehow created a real case or controversy between two parties.

Even if the Court were to find that a case or controversy existed to support Setra's claim under the Declaratory Judgment Act, the Court still retains discretion as to whether or not to hear the action. State Farm and Casualty Co. v. Taylor, 118 F.R.D. 426, 428 (M.D.N.C. 1988). This discretion must be exercised by weighing the need for declaratory relief against the consequences of giving relief. Id. at 429. It would appear that in a case, such as the instant one, where it is a close call as to whether there is a case or controversy, the exercise of discretion would be particularly appropriate.

In exercising its discretion, the Court may consider that the declaratory judgment action here does not encompass any continuing or future injury, or threats of litigation. Yet, one important purpose for a declaratory judgment is to prevent further damages from accruing. Another is to remove the threat of litigation so that a party does not act "at his peril while uncertain of his legal rights." Id. Yet again, here, all of the allegations made in the Schars' letter relate to past warranty and repair work on three of the buses they bought from Setra. No further damages would be accruing on those past actions at this time. Nor are these the type of allegations that would leave a cloud of litigation hanging over Setra's business. The buses have all been turned in by or repossessed from the Schars, so no future warranty or repair work will occur. This is unlike a patent or trademark case where allegations of infringement or misuse may affect a party's future marketing of its product.

For Setra, the benefit of pursuing a declaratory judgment action is in heading off a possible counterclaim that could be raised by the Schars in this lawsuit. However, it is not certain that the Schars will raise such a counterclaim and, if they do, it is not apparent why a declaratory judgment is a superior way of addressing the issues between the parties as opposed to a more traditional resolution of the counterclaim. This is particularly true given that the Court is recommending Setra's breach of contract claims be transferred to Texas. There, if a claim or counterclaim is raised based on Texas law, a court more familiar with that law can make any necessary determinations about whether or not Setra engaged in unfair or deceptive trade practices.

Finally, by dismissing the action, the Court avoids piecemeal litigation. It hardly serves judicial economy to have a declaratory action pending in this District and an action pending in Texas where a counterclaim could be raised which encompasses the declaratory action. This, of course, could be resolved by transferring the declaratory judgment action to Texas. But, Setra has not requested that it be transferred.

For the above reasons, the Court finds the Schars' motion to dismiss should be granted as to Setra's claim for a declaratory judgment because Setra had insufficient, objective reasonable fear that litigation was imminent as to the issues raised in Setra's declaratory judgment claim. This means that no case or controversy exists between the parties on those issues. As an alternative basis for dismissal, the Court further finds that even if a case or

controversy does exist, the Court should exercise its discretion for prudential reasons and refuse to hear the claim because there is insufficient justification to allow Setra to pursue a declaratory judgment in this Court under the unique facts of this case.

IT IS THEREFORE RECOMMENDED that the Schars' motion to dismiss or, in the alternative, to transfer this action (docket no. 7) be granted, that Setra's claims for breach of contract be transferred to the Western District of Texas, and that Setra's claim seeking a declaratory judgment be dismissed.

United States Magistrate Judge

May 19, 2004